

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW

AND APPEALS BOARD

APPLICATIONS NO. 13 AND 14 /2005 OF 6TH APRIL, 2005.

BETWEEN

EAST COAST ENTERPRISES LIMITED.....APPLICANT

AND

DEPARTMENT OF DEFENCE.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Department of Defence, Procuring Entity, dated the 11th March, 2005 in the matter of Tender Nos. DOD/423 (193) and DOD/423(218) of 2004/2005 for Supply of White Sugar and Milled Rice to the Armed Forces.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Prof. N. D. Nzomo	-	Member
Mr. Adam S. Marjan	-	Member
Mr. P.M. Gachoka	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

BOARD'S DECISION

Having heard the representations of the parties and the interested candidates herein and having considered the information in all the documents availed to it, the Board hereby makes its decision as follows: -

BACKGROUND

These tenders were, among others, advertised nationally on 23rd December, 2004. The subject tenders for supply of white sugar and milled rice to the Armed Forces closed on 19th January, 2005. Opening of the tenders was on 19th January, 2005 and 20th January, 2005 for the supply of white sugar and milled rice respectively.

Three candidates returned their tender documents for each item as at the closing/opening date of the tender. Technical Evaluation was carried out in two stages as follows:

- (i) Responsiveness of the firms to the requirements of the tender documents.
- (ii) Site visit.

On the site visit tenderers were evaluated under the parameters and scores below, which were contained in the tender documents:

		Item and score	
	Parameter	Supply of white sugar (Points)	Supply of milled rice (Points)
1	Line of business	25 points	15 points
2	Capacity	35 points	20 points
3	Transport	10 points	20 points

Based on the above parameters, tenderers scored as follows:

For supply of White Sugar:

ITEM	Points	East Coast Enterprises	Pisu and Company	Nobel Enterprises
Line of business	25	25	25	25
Capacity	35	35	35	35
Transport	10	5	5	10
TOTAL	70	65	65	70

For supply of Milled Rice:

ITEM	Points	East Coast Enterprises	Pisu and Company
Line of business	15	10	15
Capacity	20	10	20
Transport	20	10	20
TOTAL	55	30	55

The Procuring Entity, through its Departmental Tender Committee meeting held on 11th March, 2005 awarded the tenders to Pisu and Company Limited at the following prices:

1. Supply of White Sugar

- AFOD NBI Kshs.@2650/= per 50 kg delivered
- MAB @ Kshs.2650 per 50 kg delivered
- Mombasa @ Kshs.2750/- per 50 kg delivered
- AFTC @ Kshs.2650/- per 50 kg delivered

2. Supply of Milled Rice

- Nairobi region @ Kshs.2250 per 50 kg delivered
- Mombasa region @ Kshs.2150 per 50 kg delivered
- Nakuru/Gilgil region @ Kshs.2350 per 50 kg delivered
- Eldoret region @ KShs. 2400 per 50 kg delivered
- Nanyuki/Isiolo @ KShs. 2480 per 50 kg delivered

Letters of award to both the successful and unsuccessful bidders were written on 17th March, 2005.

The Appeal

The Applicant lodged the appeals on 6th April 2005 against the decision of the Tender Committee of the Procuring Entity to award the above-mentioned tenders. The Board consolidated the two appeals since parties on either side and the issues were identical. At the hearing, the Applicant was represented by Mr. Khallif Mohammed while the Procuring Entity was represented by Mr. Bonface Misera and Col. Michael Rang'inya. Pisu and Company Limited, an interested candidate, was represented by Mr. Piyush Savla.

The Applicant seeks an order that its tender be reviewed by the Board and accepted. We deal with each ground of appeal as follows: -

Grounds of appeal Number 1 and 3

These were complaints that there was an oversight in the production of the tender documents specifically the requirement that tenderers should attach a valid Trade Licence in their bids. In its representations, the Applicant argued that it had a copy of its Trade Licence and had been supplying similar items under the previous tender to the Procuring Entity. Further, it argued that the single business permit which it submitted had the same importance as the Trade Licence. However, the Applicant admitted that it did not attach its Trade Licence to its bid at the time of tender submission. It also assumed that the Procuring Entity would trace the Licence from the past records.

In response, the Procuring Entity submitted that the tender document had mandatory requirements, which were to be met by all bidders including the Applicant.

This was a new tender and the Applicant should have treated all the requirements as different and distinct from its previous arrangements with the Procuring Entity.

We have carefully considered the arguments of the parties. The Special Conditions D-1 Paragraphs 2,5 and 6 of the tender document set out mandatory requirements that all bidders had to meet in order to qualify. These requirements were as follows:

“ 2. The participating tenderers must provide copies of the following documents. The documents to be submitted along with the tender documents on or before the closing date: -

- i. Valid Trade Licence
 - ii. Certificate of incorporation
 - iii. Tax compliance certificate from KRA
 - iv. VAT and PIN registration certificate
-

5. A tenderer who fails to submit any of the documents stipulated at Condition 2,3 and 4 above will be deemed non responsive.

6. Tenderers who are established as not responsive on documentation shall be disqualified from further evaluation”

Since the Applicant admitted that it did not attach a valid Trade Licence to its tender document but instead attached a single business permit, it did not comply with the tender requirements in that respect. Thus, the Applicant cannot now claim that the non-submission was an oversight as the consequence of failure to provide the relevant attachments was non-responsiveness.

Accordingly, these grounds of appeal fail.

Grounds of appeal Number 2 and 6.

In these grounds, the Applicant claims that its tender was compliant and responsive and that is why the Procuring Entity evaluated it. In reply, the Procuring Entity stated that the Applicant should not have been evaluated since it was non-responsive for failing to provide a valid Trade Licence and a tax compliance certificate.

We have already found that the Applicant was not responsive at the time of tender opening as it failed to comply with the mandatory requirements as dealt with in grounds 1 and 3 above. In our view, compliance with a mandatory requirement cannot be waived by a Procuring Entity's negligent or un-procedural conduct.

Accordingly, these grounds of Appeal also fail.

Ground of appeal number 4

This was a complaint that the Applicant was the lowest of all the bidders at tender opening. It is not disputed that the Applicant quoted lower prices than all other bidders. The bidders quoted as follows:

For supply of white sugar

Station	East Coast Enterprises Limited	Pisu and Co. Limited	Nobel Enterprises
AFOD	2450	2650	2700
MAB	2450	2650	2850
MSA	2600	2750	2850
AFTC	2700	2650	2700

Note: All prices are in Kenya shillings

For milled rice

Station	East Coast Enterprises Limited	Wintech Systems Limited	Pisu and Co. Limited
Nairobi	1700	3900	2250
Mombasa	1750	4500	2150
Nakuru/ Gilgil	1800	4200	2350
Eldoret	1850	4800	2400
Nanyuki/ Isiolo	1800	5000	2480

Note: All prices are in Kenya shillings

In its response, the Procuring Entity argued that lower prices do not necessarily mean the best-evaluated supplier. All bidders were evaluated on other parameters other than price alone. Based on other factors mentioned above, the Applicant could not be successful on price alone.

In view of the foregoing, the Applicant was not necessarily the best candidate despite offering the lowest price at tender opening. Low prices may be deceptive and candidates need to be evaluated on other pre-determined parameters to ascertain their performance capability. In this regard, the Applicant failed.

Accordingly, this ground of appeal also fails

Ground of appeal number 5

The Applicant's complaint herein is that the Procuring Entity is bound to lose KShs. 700,000 and 5,000,000 for the respective tenders for supply of white sugar and milled rice by awarding the tender to a firm whose prices were higher. However, the Procuring Entity argued that although the Applicant quoted lower prices, it did not satisfy all mandatory tender requirements. Moreover, the Procuring Entity was bound by the Regulations to award the tender to the lowest evaluated bidder. Consequently the Procuring Entity would get value for money

only by buying from the best candidate and not necessarily at the lowest price.

The Board has considered this matter and noted that Regulation 30(8) (a) provides that: -

“The successful tender shall be: -

(a) the tender with the lowest evaluated tender price...”

In view of the aforementioned Regulation, the Procuring Entity would only have lost if the Applicant was the lowest evaluated bidder. However, since the Applicant was not responsive, it should never have been evaluated at all.

Accordingly, this ground of appeal also fails.

Ground of appeal number 7

This is not a ground of appeal but a statement of perceived losses. In our view, such losses are commercial risks normally borne by competing candidates, and the Procuring Entity is not liable for such costs.

Finally, we would like to make some closing observations in respect of this case as follows: -

- i) The tender for supply of rice was a re- advertisement.
- ii) The Procuring Entity has been using quotations to meet its procurement needs. This procurement method restricts the Procuring Entity to fewer suppliers increasing the risks of buying at inflated prices. Procurement using open tendering procedure would give rise to competitive market prices. It is therefore imperative that procurements should be subjected to competitive bidding procedure.

- iii) The Procuring Entity has not been carrying out continuous supplier assessment. This needs to be initiated to ensure that the Procuring Entity has adequate information on its suppliers.
- iv) The Procuring Entity having been before us on several previous occasions, we note that it has made positive progress in improving its tendering process. In particular, its tender design and evaluation criteria have greatly improved the tender process, and the Board commends the Procuring Entity to that extent.

Taking into account all the foregoing matters and the fact that the Applicant's grounds of appeal have no statements particularising the alleged breach of the Regulations, and also considering its non-responsiveness to the mandatory tender conditions, we hereby dismiss this appeal and order that the procurement process do continue.

Dated at Nairobi on this 6th day of May, 2005



**CHAIRMAN
PPCRAB**



**SECRETARY
PPCRAB**